Leong Chee Kong & Anor v Tan Leng Kee

HIGH COURT (KUALA LUMPUR) — SUIT NO S5-22-74 OF 1998
JAMES FOONG J
10 AUGUST 1999

Succession *— Probate — Contentious suit — Petition for probate by defendant — Caveat and appearance consequent to warning entered by plaintiff — Whether fresh probate action could be instituted by plaintiffs*

Succession *— Probate — Consolidation — Two probate actions in respect of the same estate — Same parties, same facts and same issues involved — Whether both actions could be consolidated — Effect of such consolidation*

The defendant had filed a petition for probate for the estate of one Leong Chee Keong, registered as S4–32–474–96 ('probate petition S4') and assigned to High Court 4. The plaintiff, the sole surviving brothers of the deceased, lodged a caveat which caused the defendant to issue a warning through the registrar to the plaintiffs. The plaintiffs filed an appearance to probate petition S4 and commenced a fresh probate action registered as S5–22–74–1998 ('probate action S5'), assigned to High Court 5. When the probate petition S4 eventually came up for hearing, the defendant raised a preliminary objection to the form and mode of the appearance filed by the plaintiffs. By a decision delivered on 8 September 1998, the learned High Court judge ruled the plaintiffs' appearance invalid and struck it off. The learned judge further ordered that a statutory declaration which bequeathed the deceased's entire estate to the defendant be admitted as proof of the deceased's will. Soon after the decision of 8 September 1998 in respect of probate petition S4, the plaintiffs served the writ in their probate action S5 on the defendant whereupon the defendant applied to strike out the action. The senior assistant registrar however dismissed the defendant's application and the defendant appealed to the judge in chambers. At the hearing of the appeal, the learned judge had to consider the following issues: (i) whether the plaintiffs could institute and proceed with probate action S5 after having entered a caveat and an appearance in probate petition S4; and (ii) whether the decision of 8 September 1998 in respect of probate petition S4 bound the parties.

Held, dismissing the appeal:

(1) The defendant's argument that since the plaintiffs had filed a caveat and appearance to probate petition S4 they could not proceed with probate action S5 was entirely without merits and contrary to set procedures. The phrase 'the commencement of a probate action shall, whether or not any caveat has been entered, operate to prevent the sealing of a grant ...' in O 71 r 40(c) of the Rules of the High Court 1980 was alone sufficient to allow the plaintiffs to file a probate action, viz probate action S5 even when

they had entered a caveat and appearance consequent to the warning in probate petition S4 (see p 543A–C). A

(2) The contested probate petition S4 shared the following criteria for consolidation with probate action S5, namely: (i) it related to the same parties; (ii) involved the same facts; and (iii) engaged in the same issues. Thus probate action S5 was consolidated with probate petition S4 when the matter in probate petition S4 became a contested matter upon the entry of an appearance thereto. Since both the actions were consolidated, any decision handed down subsequently was in law binding on the parties of the two actions. If the two actions were not consolidated, there would not only be dual litigation of the same matter but also a challenge to the decision of 8 September 1998 by another court of concurrent jurisdiction. If there was any dissatisfaction with the decision, the appropriate remedy was to appeal not re-hear the probate petition S4 (see pp 543H–544C). B C D

[Bahasa Malaysia summary

Defendan telah memfailkan suatu petisyen untuk probet untuk harta pusaka seorang Leong Chee Keong, didaftarkan sebagai S4-32-474-96 ('petisyen probet S4') dan diperuntukkan kepada Mahkamah Tinggi 4. Plaintif, adik lelaki tunggal yang masih hidup kepada si mati, memasukkan suatu kaveat yang mengakibatkan defendan mengeluarkan suatu amaran melalui pendaftar kepada plaintif-plaintif. Plaintif-plaintif memfailkan suatu kehadiran kepada petisyen probet S4 dan memulakan suatu tindakan baru probet yang didaftarkan sebagai S5-22-74-1998 ('tindakan probet S5'), diperuntukkan kepada Mahkamah Tinggi 5. Apabila petisyen probet 4 akhirnya didengar, defendan membangkitkan bantahan awal kepada borang dan cara kehadiran yang difailkan oleh plaintif-plaintif. Melalui suatu keputusan yang diberikan pada 8 September 1998, hakim Mahkamah Tinggi yang arif memutuskan kehadiran plaintif-plaintif adalah tidak sah dan membatalkannya. Hakim yang arif selanjutnya mengarahkan bahawa akuan statutori yang membekueskan keseluruhan harta pusaka si mati kepada defendan boleh terima sebagai bukti wasiat si mati. Tidak lama selepas keputusan pada 8 September 1998 berkenaan dengan petisyen probet S4, plaintif-plaintif menyerahkan writ di dalam tindakan probet S5 ke atas defendan lalu defendan memohon untuk membatalkan tindakan tersebut. Walau bagaimanapun, penolong kanan pendaftar menolak permohonan defendan dan defendan merayu kepada hakim dalam kamar. Semasa pembicaraan rayuan, hakim yang arif terpaksa mempertimbangkan isu-isu yang berikutnya: (i) sama ada plaintif-plaintif boleh memulakan dan meneruskan dengan tindakan probet S5 setelah memasukkan kaveat dan suatu kehadiran dalam petisyen probet S4; dan (ii) sama ada keputusan pada 8 September 1998 berkenaan dengan petisyen probet S4 mengikat pihak-pihak tersebut. E F G H I

Diputuskan, menolak rayuan:

(1) Hujahan defendan bahawa memandangkan plaintif-plaintif telah memfailkan suatu kaveat dan suatu kehadiran kepada petisyen probet S4 mereka tidak boleh meneruskan dengan tindakan probet S5 adalah dengan sepenuhnya tanpa merit dan bertentangan dengan prosedur-prosedur yang ditetapkan. Ayat 'permulaan suatu tindakan probet akan, tidak kira sama ada suatu kaveat dimasukkan atau tidak, bertindak untuk mengelak meterainya suatu geran' dalam A 70 k 40(c) Kaedah-Kaedah Mahkamah Tinggi 1980 adalah dengan sendirinya mencukupi untuk membenarkan plaintif-plaintif memfailkan suatu tindakan probet, iaitu tindakan probet S5 walaupun mereka telah memasukkan kaveat dan kehadiran akibat langsung amaran di dalam petisyen probet S4 (lihat ms 543A–C).

(2) Petisyen probet S4 yang dipertikaikan mempunyai kriteria berikutnya untuk disatukan dengan tindakan probet S5, iaitu: (i) ia adalah berkenaan dengan pihak-pihak yang sama; (ii) membabitkan fakta-fakta yang sama; dan (iii) melibatkan isu-isu yang sama. Maka tindakan probet S5 adalah disatukan dengan petisyen probet S4 apabila perkara dalam petisyen probet S4 menjadi perkara yang dipertikaikan apabila terdapatnya kemasukan kehadiran. Oleh kerana kedua-dua tindakan-tindakan tersebut disatukan, apa-apa keputusan yang diberikan kemudiannya adalah mengikat pihak-pihak kepada kedua-dua tindakan-tindakan tersebut. Jika kedua-dua tindakan-tindakan tersebut tidak disatukan, bukan sahaja terdapatnya litigasi duaan tentang perkara yang sama tetapi juga merupakan cabaran kepada keputusan pada 8 September 1998 oleh sebuah mahkamah lain yang mempunyai bidang kuasa bersama. Jika terdapatnya ketidakpuasan hati dengan keputusan tersebut, remedi yang berpatutan adalah untuk merayu, bukan mendengar semula petisyen probet S4 (lihat ms 543H–544C).]

Notes

For cases on probate generally, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1971–2022.

Cases referred to

Lesco Development Corp Sdn Bhd v Malayan Building Society [1988] 2 MLJ 184 (refd)

Legislation referred to

Rules of the High Court 1980 O 71, rr 37, (1), (7), (14), 38(1), 40(c), O 72, r 40(c)

MY Goh (*Iza Ng Yeoh & Kit*) for the plaintiffs. A
Amarjeet Singh (*Zubeda & Amarjeet*) for the defendant.

James Foong J:

Introduction

B
This case involves a conflict in procedure concerning the application for grant of probate under O 71 and O 72 of the Rules of High Court 1980 ('the RHC'). It arose in the following manner:

In 1996 the defendant filed a petition for probate in the civil registry of the High Court at Kuala Lumpur for the estate of one Leong Chee Keong ('deceased'). It was registered as S4-32-474-96 and assigned to Civil Court C
4. For ease of reference I shall hereinafter refer to this application as the 'Probate Petition S4'. Having wind of this application, the plaintiffs, who are the sole surviving brothers of the deceased, lodged a caveat. The defendant, wishing to remove the caveat caused a warning to be issued to the plaintiffs through the registrar of the court. In response to this, the plaintiffs on 12 November 1997 filed an appearance. Besides this, the D
plaintiffs also on 9 February 1998 commenced a probate action in the High Court at Kuala Lumpur against the defendant. Here they seek inter alia: a declaration that the deceased died intestate; that the plaintiffs' are the sole beneficiaries of the deceased's estate; and that the defendant is not entitled to apply for probate under the Probate Petition S4. This action was E
registered as S5-22-74-1998 (the suit in this case) and fixed before Civil Court 5. Again, for ease of reference, I shall refer this action as the 'Probate Action'.

Sometime in March and April 1998 there was a hearing before Rahmah Hussain J in respect of the Probate Petition S4. At this hearing a preliminary objection was raised by the defendant to the form and mode of the F
appearance filed by the plaintiffs in consequence to the warning issued. After considering submissions, the learned judge delivered a decision on 8 September 1998 (the decision of 8 September 1998). She ruled the plaintiffs' appearance invalid and had it struck off. In addition, she ordered a statutory declaration dated 5 November 1996 (because the defendant has claimed that the original will of the deceased was lost and the only G
documentary proof of the will is a statutory declaration) be admitted as proof of the deceased's will which bequeathed the deceased's entire estate to the defendant. Dissatisfied with this decision, the plaintiffs appealed to the Court of Appeal. This appeal is pending.

Soon after the decision of the 8 September 1998, the plaintiffs on H
24 November 1998 served the writ in the probate action on the defendant. Though the plaintiffs have filed this probate action earlier, they did not attempt to serve it on the defendant until after the decision of the 8 September 1998. This prompted the defendant to apply immediately to strike out this probate action. This application is encl 7 of the probate action. Enclosure 7 was first heard before the senior assistant registrar of I
Court 5. She dismissed it and the defendant appealed to the judge in chambers in the form of encl 20. This is the matter now before me as a rehearing of encl 7.

A As one can observe, out of this conflict between the parties to the claim probate for the deceased's estate there are two actions: the Probate Petition S4 fixed in Court 4 and the Probate Action in Court 5.

Defendant's contention

B The defendant's grounds for striking out the probate action are as follows:

> Firstly, she claims that the plaintiffs lack standing and the right to commence this probate action. According to her, when the plaintiffs lodged the caveat and entered the appearance they agreed to be bound by any decision arising from the Probate Petition S4; thus the decision of 8 September 1998 which
> C arose out of the Probate Petition S4 binds the plaintiffs and prohibits them from proceeding with the Probate Action. Secondly, upon the filing of the appearance by the plaintiffs in the Probate Petition S4 the matter was deemed contested in accordance with O 71 r 37(14) RHC. Since Rahmah Hussain J who heard this contested matter did not direct that it should be tried under O 72 RHC (as is permitted in O 71 r 38(1) RHC) the plaintiffs cannot on their
> D volition proceed under O 72 RHC on which this Probate Action originates. Thirdly, this Probate Action amounts to a collateral attack by the plaintiffs on the decision of 8 September 1998. For these reasons, the defendant contends that the plaintiffs' Probate Action is wrongful, defective, irregular, and an abuse of the Court and should be struck off.

E *The plaintiffs' stand*

The plaintiffs are of course of a different view. Their stand is basically this: They claim to possess an independent right to bring this probate action as provided by O 71 r 40(c) of the RHC. Further, there is no rule to state that the process as set out in O 71 r 37 of the RHC (relating to caveat) must first
F be completed before commencement of any proceedings under O 72 of the RHC. In the alternative, the plaintiffs argued that since their appearance has been set aside, the Probate Petition S4 becomes an uncontested matter. In this condition, the Probate Action can continue to subsist. Thirdly, the plaintiffs assert that the substantive issue in the Probate Petition S4 of whether probate is to be granted or refused, has not been argued and
G decided, the decision of 8 September 1998 merely declares the plaintiffs' appearance set aside and the statutory declaration be used as proof of the deceased's will. The question of whether the deceased died intestate or with will has yet to be determined. The probate action can therefore be used to settle this issue.

H

Issues

After perusing the arguments above, I perceive the issues of this case to be as follows:

I (1) can the plaintiffs institute and proceed with the probate action after having entered a caveat and subsequently an appearance in the Probate Petition S4?; and

(2) does the decision of 8 September 1998 bind the parties?

Analysis

From my observation of the contentions of the parties, I find that there exists a misconception of the procedure applicable to an application for probate. For this, and in order to resolve this dispute between the parties, I feel it is necessary to begin with the basic.

Any person wishing to prove a will for probate can proceed with either: filing a petition under O 71 of the RHC as a non-contested matter or a writ under O 72 of the RHC as a contested matter. The former is known as proving the will in the common form while the latter is often referred to as the solemn form. There are reasons for the availability of these two modes.

When an applicant expects no objection or challenge to his application then he will normally apply by way of O 71 of the RHC, as a non-contested matter ie in the common form. However if he anticipates challenge to his proving of the will then it will be more appropriate to apply under O 72 RHC, as a contested matter. When a writ is filed under this O 72 the person expected to challenge the proving of the will is named as the defendant. The major difference in the two methods of approach is, in my view, the consequences. If probate is granted in the common form but is subsequently challenged, and the challenge succeeds, then the probate originally granted will be revoked. But if the will is proved in the solemn form ie by an application made under O 72, which is a contested matter, then no person who has been a party or privy to the proceedings (or aware of such application and does nothing about it) cannot afterwards put the executor to proof of the will, unless there is evidence of fraud or a latter will has been discovered. The rationale for this is that in an application of the solemn form the issue on the interest of the validity of the will has been litigated, and a decision handed down with relevant parties involved, as compared to a will proved in the common form which lacks the qualities of the former and is thus vulnerable to be revoked in a subsequent challenge — see *Willams, Mortimer & Sunnucks in Executors, Administrators and Probate* (17th Ed) at p 404.

Before or after any application for probate is made, whether in the common form or the solemn form, any person wishing to challenge the proof of a will can enter a caveat with the court registry. This is provided by O 71 r 37 RHC. When a caveat is entered no grant of probate will be made without notice to the caveator until it is removed or ceases to have any effect — see O 71 r 37(1) & (7) of the RHC. After a caveat is lodged an applicant for probate can either file a contested petition under O 72, or request the registrar of the court where the caveat was entered to issue a warning to the caveator. Upon receiving this warning the caveator has eight days from date of service of the warning to enter an appearance. Upon an appearance being entered in consequence to the warning of the caveat, the matter is deemed to be a contested matter — see O 71 r 37(14) RHC. And 'Every contested matter must then be referred to the judge who may dispose of the matter in the dispute in a summary manner or direct that the provisions of O 72 shall apply.' — see O 71 r 38 of the RHC.

Having elaborated on the relevant procedures available, let us now examine the facts of this case in relation to these processes. The defendant

A has filed an uncontested petition for probate in the common form — the Probate Petition S4. The plaintiffs wishing to challenge it entered a caveat. Besides, the plaintiffs also commenced the probate action. On the latter, the defendant takes issue claiming that once the plaintiffs have filed a caveat and entered an appearance to a warning the plaintiffs can no longer be allowed to proceed with the Probate Action. I find this argument of the B defendant entirely without merits and contrary to set procedures. Order 71 r 40(c) of the RHC is clear when it pronounces that 'the commencement of a probate action shall, *whether or not any caveat has been entered,* operate to prevent the sealing of a grant ...'. This phrase alone is sufficient to allow the plaintiffs to file a probate action even when they have entered a caveat and C appearance consequent to a warning.

The next issue is more delicate. There is no similar rr 37(14) and 38 of O 71 RHC in the English Supreme Court Practice which considers a matter as contested upon an appearance being entered in consequent to a warning, and such contested matter will be referred to the judge who can either decide it in a summary fashion by a more elaborate process of O 72 RHC. D I highlight this because the procedure and law relating to probate and administration of a deceased person is taken entirely, if not, substantially, from the English law. In England, according to current practice, when an appearance is entered to a warning of a caveat and a probate action is filed, the family division where an appearance is filed will transfer its matter to the E chancery division of the High Court which handles all probate actions. This matter will then be tried as a contested matter. In Malaysia, though we have different divisions in the High Court at Kuala Lumpur, only the civil division handles all matters relating to probate and administration of a deceased person's estate. At the present moment this division has six courts. It is not uncommon, going by the usual practice on assignment of files for F each of the six courts, to have a matter relating to caveat and subsequent appearance thereto fixed before one court while a probate action, filed separately, is allotted to another, as is the situation in this case. If one adopts the English practice, which I think is rational, then the matter in Court 4 should be transferred to Court 5, since Court 5 was dealing with a contested matter — a probate action. But such transfer did not take place nor was G there any proposal for such transfer by any of the parties. Here, I find the defendant cannot be at fault. The plaintiffs have filed the probate action but did not serve the writ on the defendant until after the decision of 8 September 1998. Thus at the time of the hearing of the Probate Petition S4 the defendant would not be aware of the probate action to even suggest H such transfer. The matter in the Probate Petition S4 was then heard. It was litigated as a contested matter as declared by O 71 r 37(14) of the RHC which states that 'upon an appearance being entered in answer to a warning of a caveat, the matter shall be deemed contested...' Now when one examines this contested matter, with the probate action the following features are exposed: it relates to the same parties, involves the same facts, I and engages in the same issues. These are the criteria for consolidation — see *Halsbury's Law of England* 4th Ed at para 69 vol 37. Confronted with these two actions bearing such characteristics, I am of the view that the probate action was consolidated with the Probate Petition S4 when the

matter in the Probate Petition S4 became a contested matter upon the entry of an appearance thereto. This approach is very much in line with the principle enunciated in *Lesco Development Corp Sdn Bhd v Malayan Building Society* [1988] 2 MLJ 184 where it pronounced that 'It is undesirable to allow a situation where two different courts would try and determine the same issues arising between the same parties relating to the same subject matter.' Further, I would like to stress that if this proposition of consolidation of the two actions is not adopted then there will also not only be dual litigation of the same matter but also a challenge to the decision of 8 September 1998 by another court of concurrent jurisdiction.

When the actions were consolidated, the learned judge in Court 4 decided to hear these matters in a summary manner. Such discretion is granted to the learned judge under O 71 r 38(1) of the RHC. And any decision handed down subsequently is in law binding on the parties of the two actions. If one party is dissatisfied with it, as the plaintiffs were, then the process is to appeal; and not by way of re-hearing of the probate action.

Conclusion

By my reasoning aforesaid, I find that the probate action cannot be struck off; it was consolidated with the Probate Petition S4. Accordingly I have to dismiss the defendant's application but with no order as to cost.

Appeal dismissed.

Reported by Andrew Christopher Simon